

**BEFORE THE APPEALS BOARD  
FOR THE  
KANSAS DIVISION OF WORKERS COMPENSATION**

**MOHAMMAD S. ASLAM**

Claimant

VS.

**HELPING HANDS OF GOODWILL**

Respondent

AND

**MANUFACTURERS ALLIANCE INS.**

Insurance Carrier

Docket No. 1,069,029

**ORDER**

**STATEMENT OF THE CASE**

Claimant requested review of the August 28, 2014, preliminary hearing Order entered by Administrative Law Judge (ALJ) Kenneth J. Hursh. David A. Slocum of Lenexa, Kansas, appeared for claimant. Jeff S. Bloskey of Overland Park, Kansas, appeared for respondent and its insurance carrier (respondent).

The ALJ found claimant's left inguinal hernia preexisted the January 12, 2014, accident and is therefore not compensable. Further, the ALJ determined claimant ineligible for temporary total disability benefits even should his injury be compensable, as claimant remained employed in a second job.

The record on appeal is the same as that considered by the ALJ and consists of the transcript of the August 27, 2014, Preliminary Hearing and the exhibits, together with the pleadings contained in the administrative file.

**ISSUES**

Claimant argues the evidence demonstrates he sustained bilateral inguinal hernias as the result of a January 12, 2014, work-related accident.<sup>1</sup> Claimant contends the claim

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<sup>1</sup> For reasons in the analysis section of this Order, the undersigned finds the date of accident to be January 22, 2014, not January 12, 2014.

was incorrectly denied, based upon the medical opinions, appearance of new symptoms and questions regarding the accuracy of a 2014 CT scan.

Respondent maintains the ALJ's Order should be affirmed in all respects. Respondent argues claimant failed to meet his burden of proving he sustained a traumatic hernia on either side arising out of and in the course of his employment. Moreover, respondent argues claimant's condition preexisted the alleged incident and is not compensable pursuant to K.S.A. 2013 Supp. 44-508(f)(2).

The sole issue for the Board's review is: Did claimant suffer personal injury by accident arising out of and in the course of his employment with respondent?

#### **FINDINGS OF FACT**

Claimant was employed by respondent to perform various jobs, including production, working the floor, cashier, and working the donation center. On January 22, 2014, claimant felt a sharp pain in his left side while lifting a large metal bed frame. Claimant indicated he had no similar symptoms or pain immediately prior to lifting the bed frame.

Prior to the alleged accident, claimant had been treated for kidney stones by his family physician, Dr. Francisco Garcia-Ferrer. On January 13, 2014, claimant was examined by Dr. Garcia-Ferrer with complaints of pain upon urination and pain associated with a possible kidney stone. Claimant returned to Dr. Garcia-Ferrer on January 16, 2014, again with complaints of persistent pain in his abdomen.

On January 24, 2014, claimant returned to Dr. Garcia-Ferrer and gave a history of performing heavy lifting three days prior with resulting pain in the left groin. Dr. Garcia-Ferrer diagnosed claimant with a left inguinal hernia and provided restrictions of no lifting over 20 pounds. Dr. Garcia-Ferrer noted claimant was in need of surgical repair.

Claimant testified he had a kidney stone in early January 2014 which caused pain in his abdomen. He stated the pain from the kidney stone was located in the upper stomach area and also occurred upon urination. Claimant testified the pain he experienced after the lifting incident while working for respondent is a constant pain in his lower left side near the groin, with swelling. Claimant explained to the ALJ:

I have a little thing that keeps on moving down and I have to put it up all the time, and it kind of gets swollen when I walk or do anything. It kind of gets swollen and starts to become a little harder.<sup>2</sup>

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<sup>2</sup> P.H. Trans. at 19.

Claimant underwent a CT scan of the abdomen and pelvis at Shawnee Mission Medical Center on January 26, 2014. The CT scan was read to show no acute abnormalities and no inflammatory mass or ascites. The CT scan revealed a "[s]mall fat-containing left inguinal hernia without significant change since November 23, 2009."<sup>3</sup> Claimant testified he previously experienced kidney stone problems in November 2009 and underwent a CT scan of the abdomen/pelvis with contrast at that time. The 2009 CT scan also revealed "a fat containing left inguinal hernia."<sup>4</sup>

Claimant reported his injury to his supervisor and was sent to U.S. HealthWorks, where he was examined by Dr. Marianne Ray on January 28, 2014. Dr. Ray diagnosed a left-sided inguinal hernia. Dr. Ray opined claimant's work-related accident was the cause of claimant's condition, as he had no hernia symptoms prior to lifting the metal bed frame. Claimant was referred to general surgery and taken off work until such time as he visited a surgeon.

Dr. Michael Davoren of Midwest Surgical Associates evaluated claimant on February 7, 2014, for possible surgical repair. Claimant complained of significant pain and had some swelling in the inguinal area. Dr. Davoren noted claimant "initially complained of a burning pain that radiated along the medial aspect of his left thigh" which was subsequently replaced with numbness.<sup>5</sup> Following a physical examination, Dr. Davoren diagnosed claimant with bilateral inguinal hernia, with the left larger and more prominent than the right. Dr. Davoren concluded claimant required surgical repair of both hernias. He anticipated claimant's right inguinal hernia will become symptomatic in the future due to the demands of claimant's work, and should a bilateral inguinal hernia repair not be approved, claimant should proceed with a left inguinal hernia repair until such time as the right can be attended. Dr. Davoren imposed a 10 pound lifting restriction until the time of claimant's surgery, with a likely return to full duty approximately 3 weeks after surgery. Claimant has not received this recommended surgery.

Claimant testified he worked at Big Lots for 16-28 hours per week in addition to his job at respondent. Claimant stated respondent did not offer an accommodated position, and his last day worked was January 12, 2014. Claimant continued his position at Big Lots throughout, increasing his hours to approximately 32-35 per week following his accident. He indicated his position with Big Lots includes working the floor and operating the cash register, and he does not perform any heavy lifting since his injury. Claimant does not currently work for any employer other than Big Lots.

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<sup>3</sup> *Id.*, Resp. Ex. A at 2.

<sup>4</sup> P.H. Trans., Resp. Ex. B at 2.

<sup>5</sup> P.H. Trans., Cl. Ex. 1 at 8.

Dr. Garcia-Ferrer again examined claimant on June 25, 2014, and reviewed the medical records from Shawnee Mission Medical Center. Claimant testified Dr. Garcia-Ferrer said the 2009 CT scan did not show a hernia. Claimant stated:

What [Dr. Garcia-Ferrer] was talking about a little piece of fat that was in the corner a long time ago when I had the kidney or whatever. That's what he said. It was not a hernia. It was a little, little piece of fat at that time.<sup>6</sup>

Dr. Garcia-Ferrer provided a note dated June 25, 2014, indicating claimant's large left-sided inguinal hernia of recent onset is work-related. Dr. Garcia-Ferrer noted the 2009 CT scan revealed a "fat pad on inguinal area" which is "not indicative of hernia"<sup>7</sup> and the diagnosis did not become definitive until after the most recent injury. Dr. Garcia-Ferrer noted claimant has a smaller inguinal hernia on the right side which is "very likely work-related."<sup>8</sup>

Claimant stated he suffers constant pain and swelling on his left side ranging from the groin into the abdomen, conditions he did not have prior to his accident on January 22, 2014. He indicated most of his pain occurs on the left side, but he cannot recall if the pain goes to the right side as well. Claimant testified:

Q. When you experience the pain, it's on the left side.

A. Well, left side, but I cannot tell you because it goes -- the pain stays right at the bottom.

Q. Okay.

A. And so I cannot say it's goes [*sic*] on the right or left or both, but mostly when I'm walking, it hurts me quite a bit and is very uncomfortable.<sup>9</sup>

#### **PRINCIPLES OF LAW**

K.S.A. 2013 Supp. 44-501b states, in part:

(a) It is the intent of the legislature that the workers compensation act shall be liberally construed only for the purpose of bringing employers and employees within

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<sup>6</sup> P.H. Trans. at 10.

<sup>7</sup> *Id.*, Cl. Ex. 1 at 11.

<sup>8</sup> *Id.*

<sup>9</sup> P.H. Trans. at 23-24.

the provisions of the act. The provisions of the workers compensation act shall be applied impartially to both employers and employees in cases arising thereunder.

(b) If in any employment to which the workers compensation act applies, an employee suffers personal injury by accident, repetitive trauma or occupational disease arising out of and in the course of employment, the employer shall be liable to pay compensation to the employee in accordance with and subject to the provisions of the workers compensation act.

(c) The burden of proof shall be on the claimant to establish the claimant's right to an award of compensation and to prove the various conditions on which the claimant's right depends. In determining whether the claimant has satisfied this burden of proof, the trier of fact shall consider the whole record.

K.S.A. 2013 Supp. 44-508(h) states:

“Burden of proof” means the burden of a party to persuade the trier of facts by a preponderance of the credible evidence that such party's position on an issue is more probably true than not true on the basis of the whole record unless a higher burden of proof is specifically required by this act.

K.S.A. 2013 Supp. 44-508(f) states, in part:

(1) “Personal injury” and “injury” mean any lesion or change in the physical structure of the body, causing damage or harm thereto. Personal injury or injury may occur only by accident, repetitive trauma or occupational disease as those terms are defined.

(2) An injury is compensable only if it arises out of and in the course of employment. An injury is not compensable because work was a triggering or precipitating factor. An injury is not compensable solely because it aggravates, accelerates or exacerbates a preexisting condition or renders a preexisting condition symptomatic.

By statute, preliminary hearing findings and conclusions are neither final nor binding as they may be modified upon a full hearing of the claim.<sup>10</sup> Moreover, this review of a preliminary hearing order has been determined by only one Board Member, as permitted by K.S.A. 2013 Supp. 44-551(l)(2)(A), as opposed to being determined by the entire Board as it is when the appeal is from a final order.<sup>11</sup>

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<sup>10</sup> K.S.A. 44-534a; see *Quandt v. IBP*, 38 Kan. App. 2d 874, 173 P.3d 1149, rev. denied 286 Kan. 1179 (2008); *Butera v. Fluor Daniel Constr. Corp.*, 28 Kan. App. 2d 542, 18 P.3d 278, rev. denied 271 Kan. 1035 (2001).

<sup>11</sup> K.S.A. 2013 Supp. 44-555c(j).

### ANALYSIS

Claimant alleges a date of accident on January 12, 2014. Respondent recorded an accident date of January 22, 2014. Based upon a review of the evidence, including Dr. Garcia-Ferrer's January 24, 2014, clinical note and the clinical history contained in Dr. Ray's medical report, the undersigned finds for the purposes of this Order the accident date to be January 22, 2014.

Respondent and the ALJ rely on the 2009 CT scan as evidence that claimant's current condition is the result of a preexisting condition, and thus not compensable. The undersigned disagrees.

Dr. Garcia-Ferrer wrote that the prior CT scan was not indicative of hernia and that the diagnosis of hernia did not become definitive until after claimant's injury. Dr. Garcia-Ferrer also wrote that both the left and right inguinal hernias were related to the reported accident. These statements by Dr. Garcia-Ferrer are uncontroverted. Dr. Ray's statement that the injury to claimant's abdomen arises out of and was caused by the injury on January 22, 2014, is also uncontroverted. Uncontroverted evidence may not be disregarded and is generally regarded as conclusive absent a showing it is improbable or untrustworthy.<sup>12</sup>

It is also significant that there is no examination report or medical opinions that coincide with the 2009 CT scan. Without some medical evidence to support that the preexisting condition found in the 2009 CT scan is the prevailing factor for the need for medical treatment, it is impossible to say claimant's current need for medical treatment is solely because of the condition noted on a 2009 CT scan.

### CONCLUSION

Claimant suffered bilateral inguinal hernias resulting from an injury by accident arising out of and in the course of his employment with respondent on January 22, 2014.

### ORDER

**WHEREFORE**, it is the finding, decision and order of this Board Member that the Order of Administrative Law Judge Kenneth J. Hursh dated August 28, 2014, is reversed and remanded for the ALJ to issue a new Order consistent with this Order.

**IT IS SO ORDERED.**

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<sup>12</sup> See *Anderson v. Kinsley Sand & Gravel, Inc.*, 221 Kan. 191, 558 P.2d 146 (1976).

Dated this \_\_\_\_\_ day of November, 2014.

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HONORABLE SETH G. VALERIUS  
BOARD MEMBER

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Kenneth J. Hursh, Administrative Law Judge